

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

U.S. FUTURES EXCHANGE, L.L.C.)
and U.S. EXCHANGE HOLDINGS,)
INC.,)
Plaintiffs,) Case No. 04 C 6756
-vs-) Chicago, Illinois
BOARD OF TRADE OF THE CITY OF) April 27, 2018
CHICAGO, INC. and CHICAGO) 9:07 a.m.
MERCANTILE EXCHANGE, INC.,)
Defendants.)

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE THOMAS M. DURKIN

APPEARANCES:

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1 APPEARANCES: (Continued)

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For the Defendants: MR. ALBERT L. HOGAN, III
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1 (Proceedings heard in open court:)

2 THE CLERK: 04 C 6756, U.S. Futures v. Board of
3 Trade, and I need to get counsel on the line for that one.

4 MR. SCHUTTE: Good morning, Your Honor. Scott
5 Schutte --

6 THE COURT: Why don't we wait until we get someone on
7 the line. We don't have to do it twice then.

8 (Clerk placing phone call.)

9 THE CLERK: Good morning, everyone. This is Sandy
10 with Judge Durkin, and this is case 04 C 6756, U.S. Futures v.
11 Board of Trade.

12 THE COURT: All right. Let's have everyone identify
13 themselves for the record, starting first with the people on
14 the phone.

15 MR. SHAH: Hello. This is Sujal Shah and Kent Roger
16 from Morgan Lewis representing plaintiff.

17 THE COURT: Good morning.

18 MR. JOHNS: Good morning, Your Honor. This is
19 Zachary Johns from Morgan Lewis representing the plaintiff.

20 THE COURT: Okay.

21 And in court?

22 MR. SCHUTTE: Good morning, Your Honor. Scott
23 Schutte on behalf of plaintiffs.

24 MR. KLIEBARD: Good morning, Your Honor. Ken
25 Kliebard also on behalf of plaintiffs.

1 MR. HOGAN: Good morning, Judge. Al Hogan for the
2 defendants.

3 MR. RIDGWAY: William Ridgway for the defendants.

4 THE COURT: All right. I had asked you to come in
5 today. I have reviewed the voluminous summary judgment
6 briefs, the last of which was received April 13th, about two
7 weeks ago. And I told you I would give you a preliminary view
8 as to whether this three-week jury trial is going to proceed
9 as scheduled on June 4th.

10 I believe the defendant has raised arguments that
11 have significant merit, at least as to the antitrust claims.
12 Those claims are dismissed. The plaintiffs' motion for
13 summary judgment is moot. And the remaining state court
14 claim, if it survives, which is questionable, will result in a
15 much shorter and different trial than the one currently set.

16 This is a preliminary ruling meant to prevent the
17 parties from spending the next five weeks preparing for a
18 trial that will not occur if the written decision is
19 consistent with my current thinking. It's simply not fair to
20 the parties, the witnesses, and the attorneys to keep the
21 trial date in light of how I believe I'm going to rule.

22 So, accordingly, the trial date is vacated, as is the
23 final pretrial conference, as are all of the filing dates for
24 *Daubert* motions, motions *in limine*, the final pretrial order,
25 and any other deadlines that have been set.

1 I put in a message to Judge Valdez but have not been
2 able to reach her. I know you're submitting a number of
3 documents to her for her to review *in camera*. I don't want
4 Judge Valdez to have to do unnecessary work. I'll leave it to
5 her whether she wants -- I haven't dismissed the case.
6 There's a written ruling that's going to have to come out.
7 I've been on trial, and I'm not in a position to make a
8 written ruling today. And you need to see my reasoning. I
9 need to confirm in a written ruling what my preliminary view
10 is right now. But I've put it in a call to Judge Valdez.
11 When I reach her, I'll let her make a decision of whether or
12 not she thinks she ought to proceed with that discovery. My
13 opinion is it's going to be unnecessary, at least -- if things
14 change in my thinking, it's something she can pick up where
15 she left off. But I don't want her to do -- she's got plenty
16 of other cases, and I don't want her to do work that's
17 unnecessary. So I'll leave that to her, but I've got a call
18 in to her. And if you have contact with her before I reach
19 her, you can tell her what I've just said today.

20 But that is -- as promised, I wanted to give you this
21 information because I think it's unfair to -- once I reach a
22 conclusion at least where I'm at right now to make you spend
23 the next five weeks, which I know, having been in your shoes,
24 how you would be spending it. And that's unfair.

25 So all is vacated. You'll get a written ruling. If

1 there is -- if there is a state claim that survives, we'll
2 have you come in, and we'll have you talk about how that is
3 going to proceed. If the case is dismissed in full, that will
4 be the result of the order. And if my decision -- although
5 it's unlikely, but if my decision is that the antitrust claims
6 remain, then we'll have to set a new trial date, but I'm not
7 going to leave you hanging.

8 So that is the preliminary ruling, and the next thing
9 you'll get from me is a written order.

10 Any questions?

11 MR. SCHUTTE: Well, yes, Your Honor.

12 THE COURT: Sure.

13 MR. SCHUTTE: One question: When we had our
14 in-chambers conference, the off-the-record, pursuant to your
15 standing order, you suggested that you might want to hear oral
16 argument. Is that no longer something you want to hear?

17 THE COURT: No. The briefing was very good on both
18 sides. This is not a comment on the excellence of the
19 briefing on both sides. It's my reading of the cases that
20 both sides have put in front of me. I don't think oral
21 argument is going to be necessary. So if, in preparing the
22 written order, I feel it will be necessary, I'll let you know.
23 I typically give oral arguments whenever someone asks for it,
24 but at this point, I'm too deep into this to believe that it's
25 going to be helpful. And if I change mind on that, I'll let

1 you know, and we'll set it up for a convenient time. I won't
2 call you on a Thursday and say come on in the next day. I'll
3 give you plenty of notice so that whoever is going to do the
4 arguing is able to prepare for it properly, but I don't need
5 it right now.

6 And I think that's all I have to say, unless there's
7 some questions.

8 MR. HOGAN: Judge, from me, no commentary on the
9 ruling.

10 I think I speak for everybody, we do appreciate you
11 approaching the procedure here the way you've done. It means
12 a lot to us.

13 THE COURT: All right. Well, I think it's made sense
14 in a case of this magnitude, magnitude in the sense of the
15 effort that would have to go into your preparation of *Daubert*
16 motions, your preparation of experts, the many motions *in*
17 *limine* that inevitably would have to be filed, the -- and the
18 number of witnesses I know you would all have to call in this
19 case to present your positions. So that's where we stand
20 right now. You'll get something in writing.

21 And any other questions? Anybody on the phone have
22 any questions?

23 MR. SCHUTTE: Your Honor, I would just say that we're
24 obviously disappointed in the ruling. But we'll echo what
25 Mr. Hogan has said, is that this is much preferable to

1 spending the next four weeks waiting for a written ruling
2 while preparing for trial. So we do very much appreciate
3 that. And I will say, as we've had commentary within the
4 firm, I wish more judges would take this approach.

5 THE COURT: Well, it made sense in this case
6 certainly. So -- and usually summary judgment is briefed so
7 far in advance of trial that nobody is really preparing for
8 trial until you get a ruling. Here I just know the type A
9 personalities on both sides, you've been preparing for trial
10 already, but it's going to get really intense. It would have
11 as of 9:30 if I had said something different.

12 Okay. Thank you all.

13 MR. HOGAN: Thank you, Judge.

14 MR. SCHUTTE: Thank you, Your Honor.

15 (Which were all the proceedings heard.)
16

17 CERTIFICATE

18 I certify that the foregoing is a correct transcript from
19 the record of proceedings in the above-entitled matter.

20 /s/Kelly M. Fitzgerald

April 27, 2018

21 _____
22 Kelly M. Fitzgerald
Official Court Reporter

Date

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